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MALAYAN BANKING BHD v. PERBADANAN KEMAJUAN NEGERI SELANGOR & ANOR

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY J
[APPEAL NO: 12B-182-11-2017]
B 11 JANUARY 2019

LIMITATION: *Cause of action – Accrual – When cause of action accrued – Property transferred to third party without bank's consent or knowledge – Whether cause of action arose when there was threat in right/interest in property – Whether*
C *action time-barred – Whether well within limitation period – Limitation Act 1953, s. 6*

CIVIL PROCEDURE: *Statement of claim – Pleadings – Property transferred to third party without consent or knowledge of proprietor – 'Mistake' pleaded as cause of action – Whether cause of action adequately pleaded*
D

LAND LAW: *Sale and purchase of property – Property transferred to third party without bank's consent or knowledge – Breach of undertaking to deliver title of property to bank – Whether transfer of title of property to third party communicated to bank – Whether bank suffered losses and damages – Whether solicitor acting for*
E *client liable for not properly advising client – Whether solicitor negligent*

The present appeal stemmed from an action initiated by the appellant ('plaintiff') against four defendants at the Sessions Court. The first respondent ('the first defendant') entered into a sale and purchase agreement with the third defendant and one Mohamed Yusof ('deceased') for the sale of a
F property. For this purpose, a loan facility for RM192,000 was obtained from the plaintiff. One of the conditions for approval of the loan was a confirmation from the first defendant, *inter alia*, to surrender the individual document of title ('IDT') together with the duly executed memorandum of transfer to the plaintiff, which was given by the first defendant to the plaintiff.
G The third defendant and the deceased had assigned the property to the plaintiff and when they failed to regularise the account, the plaintiff obtained a judgment in default against them. The plaintiff then commenced foreclosure proceedings only to discover that the property was transferred to the fourth defendant without the plaintiff's consent or knowledge. The plaintiff
H immediately demanded a clarification, on this matter, from the third defendant's solicitors ('the second defendant'). It was confirmed that the property was transferred to the fourth defendant but the second defendant denied any responsibility or knowledge of the transfer. The plaintiff commenced a claim for damages, at the Sessions Court, against the first to fourth defendants. Dismissing the claim, the Sessions Court Judge ('SCJ')
I held that (i) the plaintiff's action against the first and second defendants was barred under s. 6 of the Limitation Act 1953 ('LA'); (ii) the first defendant had informed the plaintiff that the title had been forwarded to the second defendant; (iii) the plaintiff failed to plead that the cause of action against the

first and second defendants was based on mistake; (iv) there was no breach of undertaking a compliance of the letter of undertaking and consent to assignment was not strictly required of the first defendant based on the principle of estoppel; (v) the first defendant could not have breached the letter of undertaking as the consent to assignment as it was admitted by the second defendant that it was their mistake to have surrendered the title to the third defendant; (vi) the plaintiff failed to show that the first defendant caused damages to the plaintiff by reason of the alleged breach of the letter of undertaking and the consent to assignment; and (vii) the plaintiff's action should fail because the plaintiff could now recover the outstanding sums due by the sale of the property. Hence, the present appeal against the first and second defendants.

Held (allowing appeal):

(1) The cause of action against the first and second defendants begun to run when a threat arose to the plaintiff's right/interest in the property caused by the first defendant's mistake and/or breach of its undertaking where it delivered the title to the second defendant where the plaintiff's right over the property was not enforceable until before the transfer from the third defendant to the fourth defendant on 4 July 2013. The threat to the plaintiff's right to register the charge occurred only on 4 July 2013 when it became impossible to do the same in its name from the moment the property was transferred to the fourth defendant. Hence, the earliest possible date the cause of action accrued was on 4 July 2013, making this instant action not time-barred and well within the limitation period. (paras 15 & 17)

(2) There was no proof of the plaintiff having been kept informed despite the first defendant being entrusted to deal with the property that was assigned to the plaintiff and they were, at all material times, aware of the undertaking given to the plaintiff, its consequences and the plaintiff's right and interest over the property. The SCJ had not taken note of s. 101 of the Evidence Act 1950 which would require the first defendant to prove that the relevant correspondence were in fact sent to the plaintiff or its solicitors in support of its defence. (paras 10 & 13)

(3) A perusal of the plaintiff's statement of claim would reveal that one of the pleaded causes of action against the first and second defendants was mistake, evinced by the words 'kesilapan' and 'dengan sengaja atau tidak sengaja' repeatedly used to plead the defendants' mistakes. There was a clear error on the part of the SCJ in finding that this claim had not been premised on the consequences of mistake when it was, in fact, adequately pleaded. As there were fraudulent acts which arose from the mistakes and/or facts of the first and second defendants, s. 29 of the LA would apply and the plaintiff's action would not be statute-barred. (paras 19 & 21)

(4) The plaintiff never agreed or assumed that the first defendant would forward the titles to the second defendant which the former could reasonably anticipate. There was no exchange of correspondence or discussion between these two parties showing otherwise. It appeared that the first defendant deliberately breached the undertaking because it was their long time practice that the IDT would be delivered to the purchasers' solicitor which the plaintiff was not apprised of. The SCJ failed to take serious note of the fact that the plaintiff released the loan to the first defendant based on the written undertaking and definitely not any purported conveyancing practice that could not override the undertaking. (paras 25 & 27)

(5) The mistake committed by the second defendant was a direct consequence of the first defendant's breach of the undertaking. It was an undisputed fact that the first defendant failed to deliver the title to the plaintiff until to date. The blame could not be placed wholly on the second defendant. The breach did occur and, until to date, the title has never been forwarded by the first defendant to the plaintiff. (para 33)

(6) The plaintiff suffered losses or damages when the charge was not registered under its name as the original title was nowhere to be found. In addition, the plaintiff further suffered losses or damages when the property was transferred to the fourth defendant and the third defendant absconded with the money. (para 34)

(7) The likelihood of the plaintiff recovering the loss by some other means or from another party did not absolve the second defendant from liability as a firm of solicitors for negligence or mistake in mishandling the title to the subject property which came to their custody. Their mistake or negligence in not properly advising their client, the third defendant, had directly facilitated the fraudulent act by the third defendant in breach of their undertaking. The SCJ's decision, that the action against the second defendant should fail, was an obvious error. (paras 38 & 39)

Case(s) referred to:

AmBank (M) Bhd. v. Kamariyah Hamdan & Anor [2013] 5 MLJ 448 ***(refd)***
Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373 ***(refd)***
Goh Kiang Heng v. Mohd Ali Abd Majid [1997] 4 CLJ Supp 320 HC ***(refd)***
Hedley Bryne & Co Ltd Appellants; and Heller & Partners Ltd Respondents [1964] AC 465 ***(refd)***
Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Public Bank Bhd v. Perwira Affin Bank Bhd [2001] 7 CLJ 447 HC ***(refd)***
Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 101
Limitation Act 1953, ss. 6(1), (5)(b), 9, 29
National Land Code, s. 341

For the plaintiff - Gan Siew, Shanty Koshy & Faten Ellyani; M/s Yong & Rakan-Rakan
For the 1st respondent - Saladin Mohd Yasin; M/s Saladin & Assocs
For the 2nd respondent - Tan Keng Teck & Tobias Lim; M/s Lim Kian Leong & Co

Reported by Najib Tamby

JUDGMENT

Gunalan Muniandy J:

[1] The appellant bank, Malayan Banking Berhad ('MBB') as the plaintiff in the court below commenced an action against the first and second respondents ('defendants 1 and 2') which was dismissed by the learned Sessions Court Judge ('LSCJ') after a full trial. Hence, the instant appeal by MBB.

Plaintiff's Claim Against The Defendants

Defendant (4) ('D4')

(i) The sale and purchase agreement ('SPA') entered into between the fourth defendant and the third defendant be declared void and the transfer which was registered on 4 July 2013 be declared null and void;

(ii) The fourth defendant be ordered to transfer the said property to the judgment debtor and the third defendant and that the charge be registered under the name of the plaintiff;

(iii) That the Deputy/Senior Assistant Registrar to execute the memorandum of transfer of the said property to the judgment debtor and the third defendant in the event that the fourth defendant fails to do so within seven days from the date this order is given; and

(iv) Such further and /or other relief as this Honourable Court deems fit and appropriate.

Defendant (3) ('D3')

(i) A declaration that the third defendant has the right to transfer the said property to the fourth defendant and the right to proceed with the transfer on the ground that his rights have been exclusively vested in the plaintiff;

(ii) The sale and purchase agreement between the fourth defendant and the third defendant and the transfer which was registered on 4 July 2013 be also declared null and void;

(iii) General damages;

(iv) Exemplary damages; and

(v) Such further and /or other relief as this Honourable Court deems fit and appropriate.

Defendant (1) And/Or Defendant (2) ('D1 And/Or D2')

(i) Special damages for a sum of RM158,780.06 as at 31 December 2009, further interest at the rate of 1% per annum on a based lending rate, calculated on monthly rests and capitalised at the end of the month ("chargeable interest"), from 1 January 2010, additional default interest at the rate of 1% per annum over the accrued interest, on the outstanding amount with minimum payment of RM5,000 per month, from 1 January 2010 until full settlement; and costs amounting to RM2,334.06 pursuant to the judgment entered against the judgment debtor and the third defendant dated 21 February 2011;

(ii) General damages;

(iii) Exemplary damages;

(iv) Further interest at the rate of 5% per annum for (ii) and (iii) from the date of the filing of the writ of summons until one day before the date of the judgment;

(v) Further interest at the rate of 5% per annum for (ii) and (iii) from the date of the judgment until full settlement;

(vi) Cost;

(vii) Cost (based on client-solicitor); and

(viii) Such further and/or other relief as this Honourable Court deems fit and appropriate.

Factual Background Of Claim

[2] The brief material facts are well summarised in the appellant's submission as follows:

(a) Based on the sale and purchase agreement ('SPA') dated 14 August 1995, the first defendant had agreed to sell to the third defendant and the judgment debtor, Mohamed Yusof bin Biru (deceased) a property known as No. 8, Jalan Timun E 24/E, Seksyen 24, 40300 Shah Alam, Selangor Darul Ehsan held under HSD 107884, PT 1348, Seksyen 24, Bandar Shah Alam at the price of RM240,000.

(b) Based on the letter of offer dated 23 September 1995, the plaintiff had approved a loan facility, "Sundry Loan Facility" for RM192,000 subjected to the terms and conditions therein.

(c) One of the conditions for approval of the loan facility was a confirmation from the first defendant, amongst others, to surrender the individual document of title (IDT) together with the duly executed

memorandum of transfer to the plaintiff, which was given by the first defendant *via* their letter dated 19 October 1995 to the plaintiff. The said letter was received by the plaintiff on 24 October 1995.

(d) The third defendant and the deceased judgment debtor had assigned the said property to the plaintiff by way of a loan agreement cum deed of assignment dated 28 March 1996. The third defendant and deceased judgment debtor had failed to regularise the account and the plaintiff on 21 February 2011 had obtained a judgment in default against them.

(e) The plaintiff had instructed its solicitor, M/s Yong dan Rakan-Rakan to conduct the foreclosure proceedings in 2013 and it was found that the said property had been transferred to the fourth defendant on 20 May 2013 without the plaintiff's consent or knowledge.

(f) The plaintiff's solicitors immediately wrote to the third defendant's solicitor, the second defendant in this case for the clarification of its finding. After a few follow up, it was confirmed that the said property has been transferred to the fourth defendant and the second defendant had denied any responsibility or knowledge of the transfer.

Grounds Of Appeal

[3] On the threshold issue of limitation, the plaintiff/appellant ('MBB') contended that the LSCJ had erred in law and/or in fact in deciding that MBB's action against D1 and D2 was barred under s. 6 of the Limitation Act 1953 ('L/A').

[4] In this appeal, the issues and grounds raised against the decision of the LSCJ in respect of the respondents are these: It was contended that the LSCJ had erred in law and in fact for the following reasons:

D1/First Respondent

(i) by failing to appreciate the written undertaking given by the first defendant to the plaintiff and recognise the first written undertaking given by the first defendant to the plaintiff and recognise the first defendant's normal practice notwithstanding it was in breach of the written undertaking. The learned Sessions Court Judge in his judgment has agreed with the first defendant's submission that the plaintiff is now estopped from denying the first defendant's usual conveyancing practice due to lack of objection from the plaintiff at the time the first defendant forwarded the original title to the second defendant.

(ii) in deciding that the first defendant did not breach the letter of undertaking and the consent to assignment on the principle of estoppel and that undertaking is not strictly required on the first defendant.

(iii) in deciding that the first defendant could not have breached the letter of undertaking and the consent to assignment as it was admitted by the second defendant that it was their mistake to have surrendered the title to the third defendant.

(iv) in finding that the plaintiff has failed to show that the first defendant has caused damages to the plaintiff arising from an alleged breach of the letter of undertaking and consent to assignment as the ingredients for actionable negligence was not fulfilled.

D2/Second Respondent

(i) in deciding that the plaintiff's action against the second defendant shall fail on the ground that the plaintiff may now recover the outstanding sums by the sale of the said property.

(ii) in deciding that any loss suffered by the plaintiff was undoubtedly caused by the intervening fraudulent act of the third defendant and therefore broke the chain of causation and thus the second defendant cannot be held responsible for the damage caused by the fraudulent actions of the third defendant.

(iii) in deciding that the plaintiff suffers no loss as the plaintiff's complaint against the second defendant is merely on the loss of right to register a charge on the said property. The voiding of the transfer registered on 4 July 2013 from the third defendant to the fourth defendant demonstrated that the plaintiff has now regained its right to register the charge on the said property.

(iv) in deciding that the second defendant is not negligent by virtue of *novus actus* interveniens as it was undoubtedly caused by the intervening fraudulent acts of the third defendant and series of events that second defendant was not involved. The fraudulent acts of the third defendant broke the chain of causation and the second defendant cannot and should not be held liable for any damages caused by such acts.

(v) in deciding that the second defendant act in assisting the third defendant to transfer the deceased judgment debtor's (Mohamed Yusof bin Biru) half share in the said property into his name (the transmission) without the plaintiff's consent and/or knowledge only amounted to a duty owed by the second defendant to their client.

(vi) in deciding that the plaintiff has failed to plead the full particulars of the allegations of fraud and/or conspiracy to defraud in their pleadings during trial.

(vii) in deciding that the plaintiff has failed to establish a claim on the allegations of mistakes.

Analysis Of Issues And Findings

[5] On the critical issue of limitation that has to be considered before the merits of the claim are looked into, MBB's contention was that the LSCJ failed to take cognizance of the exception to the general limitation under s. 6 of the Limitation Act 1953 ('L/A') which is premised on s. 29 of the Act. It was contended that while s. 6(1) of the L/A provides for a limitation

period of six years within which actions based on contract and tort must be instituted the plaintiff only found out about the breach on 25 November 2013 after conducting a title search on the said property. The plaintiff upon getting a clearer picture of the issue after corresponding with the second defendant, had immediately served a notice of demand to all the defendants on 3 December 2013.

[6] Hence, that the cause of action did not accrue until the plaintiff discovered the fraud/breach on 25 November 2013 or when an unequivocal threat occurred to the plaintiff's right over the said property, *vis-à-vis*, when the third defendant transferred the said property to the fourth defendant that was registered on 4 July 2013.

[7] For convenience, s. 29 of the Limitation Act 1953 is reproduced below:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it …

[8] MBB, amongst others, referred to the Court of Appeal case of *AmBank (M) Bhd. v. Kamariyah binti Hamdan & Anor* [2013] 5 MLJ 448 where it was held that the cause of action against the respondents only accrued upon discovery of the negligence. It was remarked:

> The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge.

[9] The LSCJ's serious error was pointed out to be having directed his mind to the facts presented by the defendants without reference to the evidence and witnesses' testimonies pertaining to this issue. His approach appeared to be to accept D1's evidence that they had surrendered the original title to the second defendant with the knowledge of the plaintiff despite, no evidence being led during the trial that the letter dated 11 August 1998 (being the communication between the first defendant and second defendant) was carbon copied to the plaintiff and Messrs Radzi & Abdullah, the plaintiff's then solicitors.

[10] Among the LSCJ's findings in relation to the issue at hand is that D1 had informed the plaintiff that the title had been forwarded to D2 when in fact there was no proof that the letter had been forwarded to the plaintiff. Neither was any evidence adduced that the plaintiff had actually received the relevant letters nor that the same had been sent out to MBB. In the absence of such evidence, it would be wrong to conclude that the plaintiff would have known of the title having been forwarded to D2. From the evidence, all communication and exchange of correspondence on the transfer/charge were made between D1 and D2 only without the plaintiff's involvement or even acknowledgement, consent, etc. There was a total absence of evidence of the important letters having been sent to M/s Radzi and Abdullah on 1978.

[11] As argued on behalf of MBB, the LSCJ had failed to note D1's failure to show any correspondence informing the plaintiff about the transfer of the said property from D1 to D3 and that all correspondence between D1 and D2 was never extended to the plaintiff and no acknowledgement and/or fax delivery report and/or proof of posting was shown to the court. This is a fact which the LSCJ should have taken account of before arising at his finding.

[12] There was no proof of MBB having been kept informed despite D1 being entrusted to deal with the property that was assigned to the plaintiff and they were at all material time aware of the undertaking given to the plaintiff its consequences and the plaintiff's rights and interest over the said property.

[13] The LSCJ had not taken note of s. 101 of the Evidence Act 1950 which would require D1 to prove that the relevant correspondence were in fact sent to the plaintiff or its solicitors in support of its defence. The letter dated 30 June 2008 from the plaintiff's solicitors proved that the plaintiff had no knowledge about the issuance of the title and transfer as the plaintiff's solicitors was asking D1's consent for direct transfer.

[14] From the record, there was no conclusive or cogent evidence adduced by D1 that the plaintiff have or would had have any notice or knowledge of the transaction and dealings between D1 and D2 over the subject property. The registration of the MOT was completed by D1 and D3 with the assistance of D2, totally without the plaintiff's knowledge or consent. No proof of service to the plaintiff was shown by D1 with regard to the correspondence between D1 and D2.

[15] This is the basis of the pleaded case that D1 had acted carelessly and negligently and/or by mistake in failing to inform the plaintiff about the subject property being transferred from D1 to D3. In the circumstances, it was right for the plaintiff to contend on the issue of limitation that the cause of action against D1 and D2 can be said to have begun to run when there arose a threat to the plaintiff's right/interest of the said property caused by D1's mistake and/or breach of its undertaking where it delivered the title to D2 wherein the plaintiff's right over the said property was not enforceable until before the transfer from D3 to D4 on 4 July 2013.

[16] In support of the above contention, reference was made to the following cases: A

(i) *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32:

> For the reasons I have stated, the period of limitation in the present case can be said to have begun to only run from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land. B

(ii) *Goh Kiang Heng v. Mohd Ali Abd Majid* [1997] 4 CLJ Supp 320; [1998] 1 MLJ 615:

> The infringement in this appeal was the non-registration of the land in favour of the plaintiff. That was the task that the defendant was contractually bound to perform. The duty to register the land in the name of the plaintiff was a continuing one till registration was effected. The damage suffered by the plaintiff would be ascertainable only when it became impossible to register the land in his name – that is to say, in 1991 when it was conveyed to the new owner. It was only at that point of time that the plaintiff could be said to have suffered any damage which is a necessary ingredient for an action founded on tort. That would be the time when all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action had accrued. C D E

[17] Applying the above principle to the factual matrix of this case, the threat to the plaintiff's right to register the charge occurred only on 4 July 2013 when it became impossible to do the same in its name from the moment the property was transferred to D4. Hence, the earliest possible date the cause of action accrued was on 4 July 2013 making the instant action not time-barred and well within the period of limitation for this action to be commenced against D1 to D4. F

[18] The LSCJ should have taken note of s. 9 of the Limitation Act 1953 that provides that the limitation period for actions for the recovery of land is 12 years. MBB also in support of its contention referred to s. 6(5)(b) of the Limitation Act 1953 that also make reference to s. 341 of the National Land Code. Section 6(5)(b) provides that nothing in s. 6 of the Act shall apply to any action to recover money secured by any mortgage of or any charge on land or personal property. By applying this section, the plaintiff is well within time under the statutory limitation period. G H

[19] The next important question was whether the LSCJ had erred in finding that the plaintiff had failed to plead that the cause of action against D1 and D2 was based on mistake. However, a perusal of the statement of claim ('SOC') would reveal that one of the pleaded causes of action against D1 and D2 is mistake, evidenced by the words 'kesilapan' dan 'dengan sengaja atau tidak sengaja' repeatedly used to plead the defendants' mistakes. Hence, there was a clear error on the part of the LSCJ in finding that this I

A claim had not been premised on the consequence of mistake when in fact it was adequately pleaded. D1 and D2, through their evidence admitted their mistake and the evidence disclosed an element of fraud.

[20] The LSCJ himself found that the transaction between D3 and D4 was null and void by reason of D3's fraudulent conduct. D3 was then D2's client
B at the time of the mistake in surrendering the title to D2 which was admitted.

[21] To conclude on this issue, as there were fraudulent acts in this case which arose from the mistakes and/or acts of D1 and D2, s. 29 of the LA would apply which means that the plaintiff's action would not be statute-
C barred.

[22] Proceeding now to the plaintiff's ('P's') case and the core issues against D1, P's claim against D1 is premised on breach of a letter of undertaking ('L/U') and consent to assignment ('CTA') executed in favour of P. It was contended that there was a grave miscarriage of justice when the LSCJ
D decided that there was no breach of undertaking and compliance of the L/U and the CTA is not strictly required of D1 based on the principle of estoppel. It was further decided that the plaintiff is now estopped from denying D1's usual conveyancing practice due to its lack of objection at the time D1 forwarded the original title to D2.

E **[23]** The question that arises is whether the LSCJ's decision that D1 did not breach the undertaking when they forwarded the title to D2 and that the undertaking is not strictly required to be followed by D1 is the result of a misdirection by the trial court on the facts, evidence and applicable law.

[24] Similarly, whether the decision that the plaintiff was estopped from
F denying the standard conveyancing practice of D1 or D2 was tantamount to something that the former never agreed to and imposed unfounded conditions on the plaintiff.

[25] It has to be noted that the plaintiff in the case here never agreed or assumed that D1 would forward the title to D2 which the former could
G reasonably anticipate. There was no exchange of correspondence or discussion between these two parties showing otherwise. The acceptance of documents relating to previous sale and purchase transactions since 1986 as the accepted usual conveyancing practice between the parties was without basis and unjustified. Importantly, DW1 himself agreed that an undertaking
H was given to the plaintiff and that the 'practice' ('amalan biasa') had breached that express undertaking. It appeared that D1 deliberately breached the undertaking just because it was their long-time practice that the IDT ('title') will be delivered to the purchasers' solicitor which the plaintiff was not apprised of.

I **[26]** In the face of the written agreement between the parties, representations made orally as alleged would not be admissible.

[27] On the whole, the weight of evidence disclosed without doubt that D1 had breached a written undertaking to the plaintiff based on an unreasonable and unjustifiable excuse of a long-standing practice that the latter never agreed to. In his finding, the LSCJ failed to take serious note of the fact that MBB had released the loan sum of RM192,000 to D1 based on the said written undertaking and definitely not any purported conveyancing practice that could not override the undertaking.

[28] There was, thus, undisputed evidence that D1 had blatantly breached its undertaking to the plaintiff by failing to deliver the title to the plaintiff. The principles governing this aspect of the law are explained in the Federal Court case of *Michael C. Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45 which held that:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

[29] Reliance was also placed by the plaintiff in the case of *Public Bank Bhd v. Perwira Affin Bank Bhd* [2001] 7 CLJ 447; [2001] 3 MLJ 129 where it was held:

> An 'undertaking' is defined in the *New Shorter Oxford English Dictionary*, Vol 2 N-Z (1993) as, *inter alia*, 'a pledge, a promise and a guarantee'. It is clear and unchallenged that the document at p 122 of the common agreed bundle of documents is an undertaking. The construction to be given to an undertaking is similar to that applied to an ordinary contract. In *Michael C Solle v. United Malayan Banking Corp* [1986] 1 MLJ 45, Hashim Yeop Sani FJ said at p 46 …
>
> The breach of an undertaking attracts damages in the same manner as a breach of contract (see *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 786). It is therefore correct to state that an undertaking is similar to that of contractual relationship.

[30] Applying the established principles to this case, it was undeniable that there was a deliberate breach of undertaking by D1 to deliver the IDT free from any encumbrances to the plaintiff together with the duly executed MOT. It was an undisputed fact that such undertaking was given by D1 and it was also undisputed that the IDT was instead delivered to D2 by D1.

[31] To conclude on the issue of breach of undertaking by D1, based on undisputed facts and the overwhelming evidence and the reasons given by the SCJ on his finding on liability, it is this court's considered view that the finding by the SCJ that it had not been proved that D1 had breached the express terms of the letter of undertaking ('L/U') and the consent was a serious error of law and/or fact and misdirection by the SCJ that caused a miscarriage of justice to the plaintiff by reason of the claim being dismissed despite overwhelming evidence in support thereof against D1 and D2.

[32] The LSCJ also held, *inter alia*, that D1 could not have breached the letter of undertaking and the consent to assignment ('CTA') as it was admitted by D2 that it was their mistake to have surrendered the title to D3.

[33] I agree with the plaintiff's contention that this part of the decision was plainly wrong as the mistake committed by D2 is a direct consequence of D1's breach of the undertaking as adverted. It was an undisputed fact that D1 had failed to deliver the title to the plaintiff until to date, the blame cannot be placed wholly on D2. The breach did occur and until to date, the title has never been forwarded by D1 to the plaintiff.

[34] As regards damages, the LSCJ had found that the plaintiff had failed to show that D1 caused damages to the plaintiff by reason of the alleged breach of the L/U and the CTA. This finding flies in the face of the undisputed fact that the plaintiff had suffered loss or damages when the charge was not registered under its name as the original title is nowhere to be found since D2 deposited the same with the ('PTGS') to be held for D3 to complete the transmission from the deceased without the plaintiff's knowledge. In addition, the plaintiff had further suffered loss or damages when the said property was transferred to D4 and D3 had absconded with the money.

[35] Despite the trial court's decision that the plaintiff had regained the right over the said property as the fraudulent transfer between D3 and D4 had been declared null and void, the LSCJ was wrong in principle not to consider the plaintiff's claim for special and other damages as pleaded in view of the indisputable fact of damages having been sustained arising from the wrongful acts of D1 and D2 together with D3.

(*Shen & Sons Sdn. Bhd. v. Jutawarna Development Sdn. Bhd. & Ors.* [2015] 8 CLJ 125; [2016] 7 MLJ 183 referred to.)

[36] On the totality of the evidence and admitted facts, the irresistible conclusion should be that both D1 and D2 had acted unlawfully and wrongfully in failing to hand over the title to P as security for the loan advanced and had, thereby facilitated the fraud perpetrated by the third defendant ('D3') based on undisputed and rebutted evidence.

[37] As regards the plaintiff's issues against D2, the LSCJ primarily decided that the plaintiff's action against D2 should fail because the plaintiff could now recover the outstanding sums due by the sale of the subject property. It was also decided that the plaintiff suffered no loss as the plaintiff's complaint against D2 is merely on the loss of right to register a charge on the said property. By reason of the transfer from D3 to D4 having been declared void, it purportedly meant that the plaintiff had now regained their right to register a charge on the subject property.

[38] On the face of it, this reasoning by the LSCJ is flawed as the likelihood of the plaintiff recovering the loss by some other means or from another party does not absolve D2 from liability as a firm of solicitors for negligence or mistake in mishandling the title to the subject property which came to their custody. Their mistake or negligence is in not properly advising their client, D3, and depositing the title with the PTGS had directly facilitated the fraudulent act by D3 in breach of their undertaking.

[39] For the above reasons, the LSCJ's decision that the action against D2 should fail on the above ground of some other means of recovery of losses was an obvious error.

[40] Likewise, the LSCJ came to an erroneous finding against the weight of evidence that the loss suffered by the plaintiff was undoubtedly caused by the intervening fraudulent acts of D3 and therefore, broke the chain of causation and thus, D2 cannot be held responsible for the damage caused by the fraudulent actions of D3. It was decided that D2 are not negligent by virtue of the maxim *novus actus interveniens* as it was undoubtedly caused by the intervening fraudulent acts of D3 and series of events that D2 was not involved in. The fraudulent acts of D3 broke the chain of causation and D2 cannot and should not be held liable for any damages resulting from such acts. It was a finding that was plainly wrong due to the existence of overwhelming evidence that the chain of evidence had not been broken as D2 had wrongly and negligently handed over the title to D3 which had a direct bearing on the loss. D2's own witness (DW4) had confirmed that D2 had assisted D3 without charge to execute the transmission in October to December 2010 to himself.

[41] As pointed out by MBB, should D2 not have assisted with the transmission of the title to D3 in 2010 and/or given the title to him, the plaintiff's charge on the subject property could have been saved and registered at any time. Similarly, if D2 had not deposited the title with PTGS, the title may have been salvaged. There was, thus, ample evidence of negligence, breach of duties and elements of conspiracy with D3 in causing wrongful loss to the plaintiff.

[42] It was within the reasonable foreseeability of D2 that if D2 had released the title to D3, D3 and/or any third party could deal with the title as they wished in disregard to the plaintiff's interest and this is why D2 had a responsibility and obligation to deliver forthwith the title to the plaintiff when they received it and not to conspire with D3 in dealing with it wrongly.

[43] D2 cannot be absolved from liability by claiming that the PTGS had lost the title as no claim had been brought against the PTGS. The onus was on D2 to prove the allegation if they wished to rely on this line of defence as the party who took custody of the title and dealt with it in violation of the undertaking to surrender it to the plaintiff.

[44] On the whole, it was obvious that the LSCJ had failed to give adequate consideration to the overall evidence and the duties and obligations in law of D2 as solicitors. Based on established principles, their professional duty of care as enshrined in several leading cases not adhered to.

(See *Hedley Bryne & Co. Ltd. Appellants; and Heller & Partners Ltd. Respondents* [1964] AC 465; and *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373).

[45] As for D2 specifically, the finding that they were not liable for the various breaches and negligence as pleaded was plainly and obviously a wrong conclusion on the facts and evidence in its totality on a proper consideration and evaluation.

[46] I also uphold the contention of P that the overall evidence pointed to D2 having committed various breaches of professional obligations, duty of care and professional duties as solicitors owed to P as the financier for the purchase of the subject property. D2 had clearly acted negligently and irresponsibly in causing the alleged loss suffered by P.

[47] Bearing in mind the governing principles relating to appeals against the decisions of trial courts which had seen and heard the witnesses at the trial, the appellate court would only disturb or interfere with the findings in exceptional circumstances where the trial court has seriously erred in law or fact, misdirected itself on the evidence or law, etc and come to a wrong finding and/or conclusion. Hence, the primary question in this appeal is whether the Sessions Court Judge ('SCJ') had seriously erred or misdirected himself in finding that P's claim against the respondents has not been proved and ought to be dismissed.

[48] On the foregoing grounds, this question has to be answered in the affirmative and accordingly, this appeal against the decision of the SCJ is allowed and the order by court below is set aside with costs to the appellant. Judgment is entered for P against D1 and D2 on the pleaded claim, except for aggravated damages which had not been proved.